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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

NO. 119

LOUISE M. WISSNER and LEANDOUS H. WISSNER,
Appellants

vs.

MARGARET WISSNER,
Appellee

BRIEF OF THE STATE OF TEXAS, AMICUS CURIAE, IN SUPPORT OF PETITION FOR REHEARING AFTER DECISION BY THE SUPREME COURT OF THE UNITED STATES

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BRIEF OF THE STATE OF TEXAS, AMICUS CURIAE, IN SUPPORT OF PETITION FOR REHEARING AFTER DECISION BY THE SUPREME COURT OF THE UNITED STATES

Statement

This brief is filed by the State of Texas in accordance with Rule 27 of this Court.

The purpose of this brief is to urge that a rehearing of this cause be granted and that the Court re-

consider the decision heretofore rendered herein in view of its effect on the community property laws of the State of Texas and the rights secured thereby.

Purpose and Scope of the Brief

The State of Texas does not consider it appropriate to take sides in litigations between parties on questions of the extent of property rights, if any, which are secured to said parties by the laws of another state. Where, however, the effect of a decision adjudicating such rights cannot fail to do violence to rights secured by the community property laws of this State, it becomes both proper and necessary for the State of Texas to take action to protect the rights of its citizens and to urge their recognition by this Court. We will accordingly direct this brief primarily to a consideration of those fundamental principles of Texas community property law and the rights declared and secured thereby which will be affected by the opinion of this Court.

Interest of the State of Texas

Since the opinion in this case is applicable to both War Risk Insurance of World War I and National Service Life Insurance of World War II, the property rights of a vast number of Texas citizens are jeopardized thereby. Furthermore, the orderly administration of justice under the laws of this State necessitates a determination of the nature of government insurance policies purchased from community funds so that it may be clear whether the choses in action evidenced thereby are community property or separate property. It is respectfully urged that

the decision heretofore rendered herein is irreconcilable with the fundamental principles of Texas community property law and cannot be logically followed by the courts of this State in the administration of the laws of this State; and that therefore it is essential that the decision be reconsidered.

Argument

I.

The Decision Heretofore Rendered Does Violence to Texas Community Property Laws in That It Permits a Husband Unlimited Management, Control and Disposition of the Wife's Interest in Community Estate.

Under Texas law, the husband may designate as beneficiary of insurance policies on his life any person who has an "insurable interest"[1] in his life. This is true although the policies were acquired during coverture with community funds; and at the husband's death the proceeds of a policy on his life *vest in the beneficiary named* in the policy. *Volunteer State Life Insurance Co. v. Hardin*, 145 Tex. 245, 197 S.W. (2d) 105 (1946). Under the Texas law the husband has this power of designation by virtue of his general power of management or control of the community.[2] *But the power, and consequently the rule above stated, is limited by the requirement that it must not be exercised in fraud of the rights of the wife.* The Texas Courts have consistently endeavored to require the husband to act as a fiduciary should

[1]The legal meaning of this phrase as established by decisions of the Texas courts is not material here.

[2]Speer, Law of Marital Rights in Texas, (3rd Ed.) p. 93.

act in the handling and disposition of the community property; and have accordingly held that whenever fraud enters the picture, the husband may not designate another as beneficiary of policies on his life with the intent and for the purpose of depriving the wife of her share in the community estate. Should he attempt to do so, the wife may receive relief from the wrongful act of the husband. *Moore v. California-Western States Life Insurance Co.*, 67 S.W. (2d) 932 (Tex. Civ. App. 1934);[3] *Aaron v. Aaron*, 173 S.W. (2d) 310 (Tex Civ. App. 1943).[4]

Where the husband uses community funds for the payment of premiums on a policy on his life with the fraudulent intent of depriving the wife of her share in the community, these cases clearly recognize the wife's property rights in the *fund* used for payment of premiums, the wrong done to her rights by the husband's fraudulent act, and allow recovery measured by a part or all of the *proceeds* of the policy.

It is clear that the wife, having a vested interest in the community funds used for payment of premiums, acquires by mutations[5] a vested interest in the *policy*

[3] (Error dismissed by the Supreme Court of Texas.)

[4] (Error refused by the Supreme Court of Texas for "want of merit.")

[5] *Furche v. Sailer*, 8 S.W. (2d) 334 (Tex. Civ. App. 1928); Speer, Law of Marital Rights in Texas, (3rd Ed.) p. 462, presents it thusly: "It is not necessary to cite authorities upon a proposition so fundamental. It was never contemplated that the community should be denied the right freely to sell or exchange its possessions, upon pain of changing the status of the property if such sales or exchanges were made. To what estate could it be transferred by such a process?"

and that a fraudulent intent to deprive the wife of her vested interest in the policy gives her the right to recover an amount at least equal to one-half the proceeds. We wish to stress that under the Texas view the wife does not and cannot acquire a vested interest in the proceeds (death benefits) as such, of even a non-governmental policy matured by death of the insured where a third person is properly named beneficiary. *Volunteer State Life Ins. Co. v. Hardin.*[6] The insured has the contractual right and power to designate the person of his choice as beneficiary and the insurer can safely rely upon such designation.[7] The insured has such right and power under the National Service Life Insurance Act and the Veterans Administrator can just as safely rely upon such designation. *But the opinion heretofore written in this case wipes out the wife's property rights in the funds (earnings) used for the payment of premiums and the consequent property rights in the policy and the right to recover one-half of the proceeds where the husband acts in fraud of the wife.*

We respectfully point out that all of these traditional and firmly settled rights are wiped out on the basis that such was the implied intent of Congress to prevent interference with the insurance fund and the free designation of the beneficiary by the service man. YET THESE TRADITIONAL COMMUNAL PROPERTY RIGHTS MAY BE FULLY RESPECTED WITHOUT SUCH INTERFERENCE. THIS IS DEMONSTRATED BY THE FACT THAT NON-GOVERNMENTAL INSURERS CAN SAFELY PAY THE DESIGNATED BENEFICIARY—FREELY DESIGNATED BY THE INSURED.

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[6]145 Tex. 245, 197 S.W. (2d) 105 (1946).

[7]Article 4736a, V.C.S. Appendix, p. 29.

We are not here concerned, nor would it be proper for us to be, with the existence of a fraudulent intent on the part of the husband in this particular case. However, in view of the fact that the decision in this case gives the husband an unqualified power of disposal of community funds for the payment of premiums on governmental insurance policies, it is necessarily contra to the Texas cases cited, necessarily irreconcilable with the fundamental principles of community property law on which they rest, and necessarily in derogation and denial of long established property rights of the wife in community funds.

A. Community Property Rights in Texas are Controlled by the Constitution.

Since by statute[1] in Texas the community estate is composed of "all property acquired by either the husband or wife during marriage, except that which is the separate property of either one or the other," any acquisition by either spouse during marriage becomes community unless it falls within the definition of separate property.[2] Separate property is limited to property acquired by gift, devise or descent and to the increase of separate lands. Speer, Law of Marital Rights in Texas, (3rd Ed.) 436. Thus all earnings during marriage,—salaries, wages and business profits *and any property acquired therewith*—are community property; and this is true whether the acquisition is accomplished by the husband or by the wife. The wife's rights of ownership in all property so acquired are in every respect equal to those of her husband. It has

[1]Article 4619, V.C.S. Appendix, p. 28.

[2]Article XVI, Section 15, Constitution of the State of Texas, defines the wife's separate property. Appendix, p. 30.

been said by this Honorable Court that these rights are identical, that the husband and wife own the estate in common, and that though the husband is the active managing partner of the union, yet her claims to the common property are equal to his.[10]

In the leading Texas case of *Arnold v. Leonard*,[11] two statutes which had the effect of declaring that the rents and revenues of the separate property of the wife would be her separate property, were held to violate the provisions of the Texas Constitution[12] defining the wife's separate property in that it was an attempt to enlarge the wife's separate property; that the Constitution gave rise to an implied prohibition against the legislative power either to add to or withdraw from the wife's separate property. This case has been cited and followed by many succeeding Texas cases for the principle that the legislature cannot enlarge upon the provisions of the State Constitution and make that separate property of the wife which otherwise would be community property. *Gohlman, L. & Co. v. Whittle*, 114 Tex. 548, 273 S.W. 808 (1925); *Frame v. Frame*, 120 Tex. 61, 36 S.W. (2d) 152 (1931).

There is no constitutional definition of the husband's separate property in Texas, and consequently, in *Stephens v. Stephens*,[13] a statute making rents and revenues from the husband's separate estate the

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[10] *Hopkins v. Bacon*, 282 U.S. 122 (1930).

[11] 114 Tex. 535, 273 S.W. 799 (1925).

[12] Article XVI, Section 15, Constitution of the State of Texas. Appendix, p. 30. The 1948 amendment provides for changes in the community estate if accomplished pursuant to the constitutional amendment.

[13] 292 S.W. 290 (Tex. Civ. App. 1927).

separate property of the husband was held to be constitutional. However, in *Commissioner v. Wilson,*[14] the Circuit Court of Appeals held that the said statute relating to rents and revenues from the husband's separate estate was unconstitutional. It was urged to the Circuit Court that since the State Constitution did not define the husband's separate estate, there was nothing to render ineffective its statutory extension. However, this Federal Court indicated that the whole course of legislation in Texas indicated a purpose to treat husband and wife alike in fixing their separate estates as against the community, and as the statutes were clearly connected with and dependent upon one another, since the provision as to the wife was unconstitutional, the provision as to the husband must also be so regarded.

It is urged that these cases clearly demonstrate that the community property system of Texas forms a pattern whereby constitutionally the property rights of the spouses are definitely fixed and cannot be enlarged or diminished by legislative or judicial processes. Yet the opinion heretofore written in this case permits the husband to completely destroy the wife's community property interest in funds used to pay premiums on National Service Life Insurance policies.

B. A Basic Principle of Texas Community Property System Is Limitation of Right of Husband to Manage, Control or Dispose of Wife's Interest in Community.

The majority opinion heretofore rendered in this case states that it will not attempt to epitomize a

[14]76 F. (2d) 766 (C.C.A. 5th Tex. 1935).

legal system at least as ancient as the customs of the Visigoths, in noting that the community property principle rests on more than the moral obligation of supporting spouse and children. However, it seems that this Honorable Court may not have considered certain additional principles inherent in our community property system whereby the wife secures certain vested rights.

Emphasis should be made of the vast difference between the civil law concept of marriage as a partnership and the common law concept of marriage as vesting in the husband all common property as well as making him the sole legal entity. Under the partnership concept, all property possessed by the husband and wife is presumed to be common property, owned equally by each, with the husband as the managing partner. This system, inextricably woven into the whole fabric of Texas life and law, has had no need of fundamental changes to adapt it to the present day requirements of husbands and wives. By contrast, it has been only by statutory enactments that married women in most common law jurisdictions have been permitted rights in their own property.

The sharp difference in the two basic concepts of ownership of property acquired after marriage is exemplified by *Willcox v. Penn Mutual Life Ins. Co.*, 357 Pa. 581, 55 A. (2d) 521 (1947), wherein the Supreme Court of Pennsylvania declared that State's Community Property Law of 1947 to be unconstitutional under both the Constitution of Pennsylvania and the Federal Constitution. The court there considered the statute passed in 1947, purporting to superimpose a community property system upon a state property structure where common law rules and principles

with respect to property held by and between husband and wife had been traditionally followed. The court received the benefit of profound research by many of the more prominent attorneys of Pennsylvania on the basic differences between the two marital property concepts. As a result they found that the newly enacted Community Property Law of 1947 made income and profits derived from property owned by a spouse prior to the effective date of the law, the common property of both spouses and that therefore its effect was to deprive the spouse of property without due process of law. The court was careful to note that the principles laid down by the Spanish law, and followed in the constitutions, statutes and judicial systems of some of the traditional community property states (including Texas) from the very beginning of their governmental existence, made such income and profits community property belonging to both spouses by halves.

The Pennsylvania Supreme Court also found that the said Community Property Law of 1947 failed to have any limitation on the management, control, and disposition of such community property by the husband and that therefore the wife was not really an owner of the property since she had none of the incidents of ownership. The court noted by contrast the limitations imposed by the traditional community property states (including Texas) upon the management, control and disposition of the community property by the husband.

This decision further emphasizes that the husband's administration of the community must be directed to the preservation and use of it for the common benefit of himself and his wife and may not be exercised to the latter's prejudice. The decision heretofore ren-

dered in this case permits the husband to administer community funds, in which the wife has a vested interest, to her prejudice by using such funds to pay premiums on National Service Life Insurance policies wherein some third party beneficiary may acquire complete rights in such proceeds "during life". It forecloses remedial relief where heretofore the courts have always granted such relief in favor of the wife for any violation of the husband's duties in regard to administration, control and disposition of the communal property. *Swisher v. Swisher*, 190 S.W. (2d) 382 (Tex. Civ. App. 1945).

C. The United States Supreme Court has Heretofore Recognized Limitation of Right of Husband to Manage, Control or Dispose of Wife's Interest in Community.

Respectfully called to the attention of this Honorable Court is the fact that heretofore this Court has clearly recognized the nature and the extent of the wife's vested property rights in the community property. In *Poe v. Seaborn*,[15] 282 U.S. 101 (1930), and

[15]Other Federal cases recognizing such rights include *Commissioner of Internal Revenue v. Fleming*, 155 F. (2d) 204 (Circ. Ct. of App., 5th Circ. 1946), wherein the court considered an appeal by the Commissioner from a decision of the tax court denying a claim of deficiency in a gift tax return of Fleming for 1938. Involved were two annuity contracts and two life insurance contracts on the life of Mrs. Fleming naming her daughter as beneficiary, with the usual reservation on the part of insured to change beneficiaries and the mode of settlement. The premiums for the insurance policies and the annuity were paid from community funds by checks drawn by Fleming on an account from which Mrs. Fleming also drew funds. The tax court found that the chief reason for taking out these contracts was Fleming's belief that the $40,000 face value life insurance policies would

companion cases (*Goodell v. Koch*, 282 U.S. 118, *Hopkins v. Bacon*, 282 U.S. 122, *Bender v. Pfaff*, 282 U.S. 127, and *United States v. Malcolm*, 282 U.S. 792) decided at the same time, it was held that according to the laws of the States with which those cases were respectively concerned, the wife had a vested property interest in the community property and not merely an expectancy. The case of *Hopkins v. Bacon*,[18] supra, dealt with the Texas community property laws, and this Honorable Court, in considering our statutes

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be exempt from the Federal estate tax and that he gave no thought to the powers granted the insured and that he did not intend to make a gift to Mrs. Fleming. Mrs. Fleming did not attempt to exercise any of the powers given her under the contracts. The Circuit Court held for Fleming on the basis that Texas decisions lay down the rule that property purchased during coverture with community funds is presumed to be community property though title be taken in the name of the wife alone. *Womack v. Womack*, 141 Tex. 299, 172 S.W. (2d) 307 (1943), was cited for the holding that a policy of insurance paid for with community funds was community property. See also *Joe J. Perkins v. Commissioner of Internal Revenue*, 1 Tax Ct. 982 (1943), which considered Texas cases of *Berdoll v. Berdoll*, 145 S.W. (2d) 227, (Tex. Civ. App. 1940, writ dismissed); *Locke v. Locke*, 143 S.W. (2d) 637 (Tex. Civ. App. 1940); and *Womack v. Womack*, supra, in connection with the gift tax to be levied on a policy of insurance on the life of the husband payable to his estate wherein all premiums were paid by community funds. The tax court held that the husband made a taxable gift of only one-half the value of the insurance policy, since the wife already owned a one-half interest in such policy. The tax court specifically stated that the result in *Blaffer v. Commissioner of Internal Revenue*, 103 F. (2d) 489 (writ denied 308 U.S. 559), which had construed Texas decisions as giving the wife no vested interest in policies paid for with community funds, should be reconsidered in view of the settled Texas law.

[18] 282 U.S. 122 (1930).

containing provisions as to what should be included in community property, stated at page 126 of the opinion:

> "They provide, as is usual in states having the community system, that the husband shall have power of management and control such that he may deal with community property very much as if it were his own. In spite of this, however, it is settled that in Texas the wife has a present vested interest in such property. Arnold v. Leonard, 114 Tex. 535, 273 S.W. 799. Her interest is said to be equal to the husband's. Wright v. Hays, 10 Tex. 130, 60 Am. Dec. 200. It is held that the spouses' rights of property in the effects of the community are perfectly equivalent to each other. Arnold v. Leonard, supra. These expressions as to the wife's interest are confirmed by the authorities holding that if the husband, as agent of the community, acts in fraud of the wife's rights, she is not without remedy in the courts. Stramler v. Coe, 15 Tex. 211; Martin v. Moran, 11 Tex. Civ. App. 509, 32 S.W. 904; Watson v. Harris, 61 Tex. Civ. App. 263, 130 S.W. 237; Davis v. Davis (Tex. Civ. App.) 186 S.W. 775."

The rationale of these cases decided by this Honorable Court, after profound research and submission of briefs and arguments by a large number of prominent attorneys from many parts of this nation, is that the wife has a vested interest in the community property because: "While the husband has the managment and control of community personal property and like power of disposition thereof as of his separate personal property, this power is subject to restrictions which are inconsistent with denial of the wife's interest as co-owner." *Poe v. Seaborn,* 282 U.S. 101, 110 (1930).

THE TEXAS CONSTITUTION, STATUTES AND DECI-

SIONS IMPOSE LIMITATIONS ON THE HUSBAND'S MANAGEMENT, CONTROL AND DISPOSAL OF THE WIFE'S INTEREST IN THE COMMUNITY PROPERTY BUT THE EFFECT OF THE OPINION AS NOW WRITTEN IN THIS CASE WIPES OUT ALL SUCH LIMITATIONS HERETOFORE RECOGNIZED BY THIS HONORABLE COURT AND RELIED UPON BY THE CITIZENS OF TEXAS.

D. Summary of Community Property Principles as Applied in Texas Insurance Cases.

Following these principles of law heretofore discussed, the Texas courts have evolved, through numerous decisions,[11] definitive statements in the following situations of the rights of each spouse in the choses in action which are evidenced by a policy of insurance purchased from community funds:

1. Community Property Rights in the Cash Surrender Value of Insurance Policies Purchased During Marriage with Community Funds.

The Supreme Court of Texas has held that where insurance policies are obtained during marriage on the life of the husband or on the life of the wife and all premiums are paid from community funds, the cash surrender values of such policies constitute a part of the community estate. *Womack v. Womack,* 141 Tex. 299, 172 S.W. (2d) 307 (1943).[12] This holding

[11] An excellent and detailed discussion of "Community Property Laws As Applied to Life Insurance" by W. O. Huie, appears in 17 Texas Law Review 121, 18 Texas Law Review 121, and has been cited in numerous opinions of the Texas Courts.

[12] The following decisions of the Texas Courts of Civil Appeals hold that the cash surrender value of an insurance policy is property, and may be considered and treated as community

has recently been reaffirmed by our Supreme Court in *Volunteer State Life Insurance Co. v. Hardin*, 145 Tex. 245, 197 S.W. (2d) 105 (1946).[19]

2. Community Property Rights in the Proceeds of Insurance Policies Purchased during Marriage with Community Funds and Naming the Insured's Estate as Beneficiary.

The proceeds of a policy of insurance issued on the life of the husband during marriage, paid for from community funds and made payable to his estate are a part of the community estate and are one-half the property of the wife. Her one-half of the proceeds is therefore no part of the estate of the husband. *Mar-*

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property. *Shoemaker v. Harrington*, 30 S.W. 2d 539 (1930); *Locke v. Locke*, 143 S.W. 2d 637 (1940); *Berdoll v. Berdoll*, 145 S.W. 2d 227 (1940, error dism.). Federal recognition of these cases at pp.11-13 of this brief.

[19]The specific question before the court in this case involved the right of the husband after the death of his wife to dispose of the proceeds of policies of insurance on his life acquired during marriage with community funds. The son of the insured and his deceased wife sought to recover from the designated beneficiaries an amount equal to one-half of the cash surrender value of the policies at the time of his mother's death. Recovery was denied under the rule stated at the beginning of this argument, i.e., that in absence of an intent to defraud the wife the proceeds of a policy on the life of the husband vest in the beneficiary upon the death of the husband even though the policy was acquired during coverture with community funds. However, the court specifically pointed out that the right to the cash surrender value of the policies lapsed by the terms of the contract upon the death of the insured and that whatever rights, if any, the son had to share in the cash surrender value existed only against the father upon a partition of the community estate at his mother's death.

tin v. Moran, 32 S.W. 904 (Tex. Civ. App. 1895); *Lee v. Lee*, 112 Tex. 392, 247 S.W. 828 (1923); *State v. Jones*, 290 S.W. 244 (Tex. Civ. App. 1926, reversed on other grounds); *Jones v. State*, 5 S.W. (2d) 973 (Tex. Comm. App. 1928).

3. Community Property Rights in the Proceeds of Insurance Policies Purchased During Marriage with Community Funds and Naming as Beneficiary a Party Who Lacks an Insurable Interest.

Under Texas law if the beneficiary of a policy has no "insurable interest" the proceeds of the policy vest in the estate of the insured immediately upon his death, *Cheeves v. Anders*;[20] 24 Tex. Jur. 772, Insurance, Sec. 72; but, since under the rule stated in the second category above, only one-half of such proceeds can be deemed a part of the estate of the husband, the remaining one-half are the wife's share of the community estate.

4. Community Property Rights in the Proceeds of Life Insurance Policies Purchased During Marriage with Community Funds Naming as Beneficiary One Having an Insurable Interest.

a. In the absence of fraud.

By virtue of his power of management and control of the community,[21] the husband may use community funds to purchase a policy of insurance on his life and may validly designate as beneficiary thereof any person having an "insurable interest" provided such designation is not made with the fraudulent intent of

[20]87 Tex. 287, 28 S.W. 274 (1894).

[21]Discussed in this brief at pp. 3, 4, 7, 9-11.

depriving the wife of her share of the community estate. *Volunteer Life Insurance Co. v. Hardin*, 145 Tex. 245, 197 S.W. (2d) 105 (1946).

b. With the fraudulent intent to deprive the wife of her share of the community estate.

If the husband designates another as beneficiary of a policy on his life and pays the premiums from community funds with the fraudulent intent to deprive the wife of her share of the community estate, the wife may recover all or part of the proceeds. *Moore v. California-Western States Life Insurance Co.*, 67 S.W. (2d) 932 (Tex. Civ. App. 1934);[22] *Aaron v. Aaron*, 173 S.W. (2d) 310 (Tex. Civ. App. 1943).[23]

From the foregoing summary it is apparent that the Texas Courts have recognized and established the property rights of the respective spouses in the various choses in action evidenced by insurance policies on the life of one or both of the spouses. This recognition was inevitable under a community property system which is a system of *acquisitions and gains* during marriage. The basic concept of common ownership of property acquired during coverture necessitated a recognition of the property rights of the respective spouses in what "has become in our days one of the best recognized forms of investment and self-compelled savings.'"[24]

The decision in this case involves specifically only one of the situations in which the Texas wife's com-

[22]Error dismissed by the Supreme Court of Texas.

[23]Error refused by the Supreme Court of Texas for "want of merit."

[24]*Grigsby v. Russell*, 222 U.S. 149, 156 (1911).

munity property rights in a policy of insurance on her husband's life have been recognized. But it effectively destroys her right in this situation and allows the husband to use community funds to purchase government insurance policies on his life with the fraudulent intent and purpose of depriving the wife of her share of the community estate. In so doing it disregards and destroys property rights long secured to the wife under Texas law.

Moreover, any decision which gives the husband an unqualified power of disposal of community funds is so contra to the basic principles of our community property system that it potentially destroys all rights of the wife in any of the choses in action evidenced by a government insurance policy. This is so, since the basis of her right in any case lies in the fact that the policy was acquired during coverture with community funds.

II.

Various Provisions of Texas Law Require a Determination of Whether the Choses in Action Evidenced by Life Insurance Policies are Community or Separate Property of the Spouses.

A. Divorce.

Article 4638[25] directs a court pronouncing a decree of divorce to order a just division of the estate of the parties subject only to the limitation that the court may not compel either party to divest himself or herself of the title to real estate. The Supreme Court of Texas, in *Womack v. Womack*,[26] held that

[25] Appendix, p. 28.

[26] 141 Tex. 245, 197 S.W. 2d 105 (1946).

the cash surrender value of policies on the life of either spouse may properly be disposed of as community property on divorce if all premiums were paid from community funds.[27] Under this decision, in order to make proper division of the property of the spouses on divorce, it will be essential in many cases that Texas Courts know whether the cash surrender value of government insurance policies are the separate property of the insured spouse or a part of the community estate.[28]

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[27]Accord: *Shoemaker v. Harrington*, 30 S.W. 2d 539 (Tex. Civ. App. 1930); *Russell v. Russell*, 79 S.W. 2d 639 (Tex. Civ. App. 1934); *Locke v. Locke*, 143 S.W. 2d 637 (Tex. Civ. App., 1940); and *Berdoll v. Berdoll*, 145 S.W. 2d 222 (Tex. Civ. App., 1940, error dismissed by the Supreme Court of Texas).

[28]There is no such thing as "permanent alimony" in Texas, and it has been long settled in Texas that the husband cannot be compelled by the final decree of the court to support the divorced wife. *Cunningham v. Cunningham*, 120 Tex. 491, 40 S.W. 2d 46 (1931); *Pape v. Pape*, 13 Tex. Civ. App. 99, 35 S.W. 479 (1896, error dism.). The statutes provide only for temporary alimony to be paid pending the suit for divorce. Art. 4637, V.C.S. In an accounting upon partition of the community property, temporary alimony payments will be charged to the wife. *Hughes v. Hughes*, 259 S.W. 180 (Tex. Civ. App. 1924, error dism.). The majority opinion recognizes that some courts have held that the exemption provision of the National Service Life Insurance Act, 38 U.S.C. § 816, 38 U.S.C.A. § 816, and similar exemptions relating to pensions and veterans relief do not apply when alimony or the support of wife or children is in issue, but distinguished the "community property principle" as resting upon something more than the moral obligation of supporting spouse and children. It is submitted that the reasons for holding that such exemption provisions do not apply when the insurance proceeds are sought to be subjected to alimony and support for the wife apply with equal force to the wife's community interest in the policy, since the wife's means of permanent

B. Descent and Distribution.

Under Texas statutes of descent and distribution different provisions are made for the distribution of the separate property and of the community property in the event a spouse dies intestate.[29] It is sufficient for present purposes to point out that the amount of the distributive share is, in certain instances, dependent on whether the property was the separate or the community property of the decedent. Thus in these instances if the proceeds of a government insurance policy pass to the insured's estate, it is essential that the courts of this State know whether such proceeds are to be treated as community or separate property.

III.

Texas Citizens Should Know Whether Texas Is Entitled to Call Army Pay Community Property

We view with considerable concern the content of footnote number 2 to the opinion written in this case, wherein it is stated: "The view we take of this case makes it unnecessary to decide whether California is entitled to call army pay community property." If California is not entitled to call army pay community property and if army pay was used to pay the total amount of all premiums on the policy involved, then under any view or system of law the wife could not prevail. The case could have been de-

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support after divorce will in many instances be derived from her share of the community property which is partitioned by the divorce decree.

[29]For the controlling statutes in this situation see Appendix, p. 27.

cided solely on this point—*if* California is not entitled to call army pay community property. But if this Honorable Court entertains doubt as to whether California is entitled to call army pay community property, then presumably the same doubt exists with respect as to whether Texas is entitled to call army pay community property. Research has failed to reveal any prior suggestion or expression of such doubt on the part of this Honorable Court or on the part of the Texas courts. The reason for the expression is not at all apparent. Traditionally, and by statute and court decision, the earnings or acquisitions by onerous title of both the husband and wife in Texas have been treated as community. *Hopkins v. Bacon*, 282 U.S. 122 (1930). See generally Speer, Law of Marital Rights (3d ed.), p. 441-3.

This expression may be based on footnote number 19, page 43, Brief for the United States as Amicus Curiae, to the effect that *army pay represents a gift by the government rather than earnings, because the government can compel any person to serve in its armed services without pay!* Such conclusion is specious since in fact our government did not and does not compel persons to serve in its armed services without pay. Any serviceman would probably receive in shocked disbelief any assertion that his army pay was a gift from his government.

Such assertion further is irreconcilable with the solicitude exhibited toward the serviceman by the government brief. It is probably unnecessary to state that it is also contrary to our constitutional concepts of freedom.

WE RESPECTFULLY URGE THIS HONORABLE COURT

TO REVISE THE OPINION SO AS TO REFLECT A DECISION AS TO WHETHER CALIFORNIA IS ENTITLED TO CALL ARMY PAY COMMUNITY PROPERTY SO THAT THE CITIZENS AND THE COURTS OF THE COMMUNITY PROPERTY STATES (INCLUDING TEXAS) MAY KNOW WHAT THE PROPERTY RIGHTS ARE IN SUCH CASES.

IV.

Conclusions and Summary of Argument

Simply stated, the opinion heretofore rendered is grounded on the proposition that a recognition of the wife's rights under the State law cannot be permitted in view of a congressional "mandate" that the proceeds of the policy must be paid in all cases to the beneficiary stated therein.

But is this the "mandate" of Congress?

In the government brief submitted herein, it was argued that the "main reason for foreclosing application of the California Community Property Law is the Supremacy Clause of the Constitution * * *" and that "wherever a conflict exists between a valid Federal Statute and a State Statute, the Supremary Clause requires 'the judges in every state' to be bound by the Federal law and to reject the State law."[20]

But wherein lies the conflict?

From what portions of the Federal Statutes can one logically derive evidence of congressional intent to destroy property rights secured to the wife by State law? Certainly not in the provision that the insured shall have the right to choose a beneficiary

[20]Brief for the United States as Amicus Curiae, p. 11.

from among a stated class. Certainly not in the provision that the insured shall have the right to change the beneficiary. Certainly not in the provision that the proceeds of the policy shall be paid to the party so designated. These are but the usual provisions in any contract of insurance. The remaining provision which is strongly relied upon is the exemption provision. But surely by this provision, Congress did not contemplate barring the rights of the wife to proceeds arising from a policy in which she has a vested property interest. There is no reason to assume a congressional intent to disregard and destroy property rights secured under State laws. We submit that the provisions of the Act itself do not warrant an inference of such intent. Under this view, there is no conflict between a Federal Statute and State Law. This court has previously recognized community property rights created under State laws as being consistent with Federal Statutes.

Let us re-examine, step by step, some of the arguments that were advanced to lead the court to this drastic interpretation of congressional intent.

First of all, as a premise, we have the postulate that "consistent administrative construction given government insurance legislation by the Veterans Administration 'is entitled to great weight, "and such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required." * * *'"[32]

We have heretofore shown that the construction of

[32]Brief for the United States as Amicus Curiae, page 35.

the Veterans Administration *is* clearly wrong in that it is in violation of community property rights established by state law and based on an unwarranted interpretation of congressional intent. As a basis for this drastic interpretation of congressional intent which results in a destruction of property rights long established under State Law we are told that the "need for uniform administration, required by the detailed provisions of the 1940 Act, would be frustrated in various ways if National Service Life Insurance proceeds were distributed in accordance with community property laws of the several states." Moreover, the government argues that if established property rights are recognized, the administration of the Act would be "complicated" and that, in effect, difficult legal questions will arise."

We have demonstrated in this brief that in fact no such complications arise; but we submit that it is a novel introduction into the great body of jurisprudence of this country to suggest that legal rights of property should be determined the easy way and that administrative bodies and courts should be relieved from the burden of solving difficult legal questions. Even if it would be simpler for the Veterans Administration to follow a "consistent" course in the administration of the 1940 Act, if such consistency amounts to dogmatism and is justified by pragmatism rather than by legal principles, it becomes that "foolish consistency" which is "the hobgoblin of little minds, adored by little statesmen, and philosophers and divines."

Great emphasis has been placed on the "soldier-

[33]Id., p. 32-35.

insurance" situation,[34] but it is submitted that the decisions which have held that "'the only relations of the contract [are] between the government' and the insured service man,"[35] should not be construed as requiring the result reached in this case. Many of the policies heretofore issued have been converted. Many "soldiers" (a vast majority) to whom they were issued are no longer in the active service of their country. In these cases, most of the premiums are now being paid from civilian earnings, not from service pay; and there is no question that these earnings are community property in Texas.

We cannot conceive that the *"government-serviceman" relationship* is bettered in either war or peace by a policy which disregards the *"serviceman-family" relationship* as controlled and regulated by state law. Yet the arguments made for appellants in this case must all, in the final analysis, rest on an implied congressional intent to effectuate a policy that would permit the fraudulent destruction of family property rights secured by state laws. These laws and the property rights conferred thereunder were formulated for the purpose of preserving and protecting the family relationship and were passed in recognition of the fact that the strength of the State lies in the strength of the family unit. In war, if the morale of the family fails, the morale of the soldier suffers, and the existence of the nation is imperiled. In peace, if the sanctity and stability of the home is weakened, the strength of the nation is sapped.

Now that the exigencies of the war have passed, many former service men and women engaged in the

[34]Id., p. 42.

[35]Id., p. 42.

peaceful pursuits of life and planning for their future security have and will take advantage of the opportunity afforded by law to convert their government insurance policies. The policies so converted will frequently constitute the only item of family savings. We have previously enumerated the various situations in which the Texas law recognizes the respective property rights of husband and wife in a policy of insurance on the life of either spouse when the premiums are paid from community funds. We strongly urge that this Court reconsider its decision which does violence to these rights. We believe that upon reconsideration it will find that there is no basis for inferring a congressional intent to destroy property rights established by State law; that there is therefore no conflict between the Federal Statutes and State community property laws; and that it may consistently effectuate the intent of Congress and preserve to husband and wife their respective property rights under State law. This court has effectively protected these rights in the past. It can and should protect them in this case.

For all the foregoing reasons we respectfully submit that the Appellee's Petition for Rehearing should be granted.

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APPENDIX

Texas Statutes Involved

Article 2571, Vernon's Texas Civil Statutes.

Where any person having title to any estate of inheritance, real, personal or mixed, shall die intestate as to such estate, and shall leave a surviving husband or wife, the estate of such intestate shall descend and pass as follows:

1. If the deceased have a child or children, or their descendants, the surviving husband or wife shall take one-third of the personal estate, and the balance of such personal estate shall go to the child or children of the deceased and their descendants. The surviving husband or wife shall also be entitled to an estate for life, in one-third of the land of the intestate, with remainder to the child or children of the intestate and their descendants.

2. If the deceased have no child or children, or their descendants, then the surviving husband or wife shall be entitled to all the personal estate, and to one-half of the lands of the intestate, without remainder to any person, and the other half shall pass and be inherited according to the rules of descent and distribution; provided, however, that if the deceased have neither surviving father nor mother nor surviving brothers and sisters, or their descendants, then the surviving husband or wife shall be entitled to the whole of the estate of such intestate.

Article 2578, Vernon's Texas Civil Statutes.

Upon the dissolution of the marriage relation by death, all property belonging to the commu-

nity estate of the husband and wife shall go to the survivor, if there be no child or children of the deceased or their descendants; but if there be a child or children of the deceased, or descendants of such child or children, the the survivor shall be entitled to one-half of said property, and the other half shall pass to such child or children, or their descendants. But such descendants shall inherit only such portion of said property as the parent through whom they inherit would be entitled to if alive.

Article 4619, Vernon's Texas Civil Statutes.

Sec. 1. All property acquired by either the husband or wife during marriage, except that which is the separate property of either, shall be deemed the common property of the husband and wife; and all the effects which the husband and wife possess at the time the marriage may be dissolved shall be regarded as common effects or gains, unless the contrary be satisfactorily proved. During coverture the common property of the husband and wife may be disposed of by the husband only; provided, however, if the husband shall have disappeared and his whereabouts shall have been and remain unknown to the wife continuously for more than twelve months, the wife shall after such twelve-month period and until the husband returns to her and the affidavit hereinafter provided for is made and filed for record, have full control, management and disposition of the community property, and shall have the same powers with reference thereto as are conferred by law upon the husband, and her acts shall be as those of a feme sole.

Article 4638, Vernon's Texas Civil Statutes.

The court pronouncing a decree of divorce shall

also decree and order a division of the estate of the parties in such a way as the court shall deem just and right, having due regard to the rights of each party and their children, if any. Nothing herein shall be construed to compel either party to divest himself or herself of the title to real estate.

Article 4736a, Vernon's Texas Civil Statutes.

Sec. 1. Whenever any person shall procure the issuance of a policy of insurance on his or her life in any legal reserve life insurance company, and designate in writing filed with the company the beneficiary to receive the proceeds thereof, the company issuing such policy shall, in the absence of the receipt by it of notice of an adverse claim to the proceeds of the policy from one having a bona fide legal claim to such proceeds or a part thereof, pay such proceeds becoming due on the death of the insured to the person so designated as beneficiary, and such payment so made, in the absence of such notice received by the insurance company prior to the date of the payment of the proceeds, shall discharge the company from any liability under the policy.

Sec. 2. The provisions of this Act shall apply to all policies now in existence as well as to all policies hereafter written.

Texas Constitutional Provisions Involved

Texas Constitution of 1845, Article VII, Section 19:

All property both real and personal of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights

of the wife, in relation as well to her separate property, as that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property. [Const. 1845, Art. VII, Sec. 19; Const. 1866, Art. VII, Sec. 19; Const. 1869, Art. XII, Sec. 14.]

Texas Constitution, Article XVI, Section 15:

All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent, shall be the separate property of the wife; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband; provided that husband and wife, without prejudice to pre-existing creditors, may from time to time by written instrument as if the wife were a feme sole partition between themselves in severalty or into equal undivided interests all or any part of their existing community property, or exchange between themselves the community interest of one spouse in any property for the community interest of the other spouse in other community property, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property of such spouse.

This Amendment is self-operative, but laws may be passed prescribing requirements as to the form and manner of execution of such instruments, and providing for their recordation, and for such other reasonable requirements not inconsistent herewith as the Legislature may from time to time consider proper with relation to the subject of this Amendment. Should the Legislature pass an Act dealing with the subject of this Amendment and prescribing requirements as to

the form and manner of the execution of such instruments and providing for their recordation and other reasonable requirements not inconsistent herewith and anticipatory hereto, such Act shall not be invalid by reason of its anticipatory character and shall take effect just as though this Constitutional Amendment was in effect when the Act was passed. Sec. 15, Art. 16, adopted Nov. 2, 1948.